No. 77-1848

In the Supreme Court of the United States

OCTOBER TERM, 1978

GERALD SPRAYREGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends the prosecutor's summation, which characterized some of petitioner's trial statements as lies, amounted to prejudicial error.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on five counts of filing false annual and quarterly reports with the Securities and Exchange Commission, in violation of 15 U.S.C. 78m(a) and 78ff; two counts of making false statements to obtain a loan, in violation of 18 U.S.C. 2 and 1014; two counts of obtaining money and property by means of false and fraudulent pretenses, in violation of 18 U.S.C. 2 and 1341; one count of obstruction of justice, in violation of 18 U.S.C. 2 and 1505; and one count of conspiracy to

commit the above offenses, in violation of 18 U.S.C. 371. Petitioner was sentenced to eleven concurrent one-year prison terms. The court of appeals affirmed (577 F. 2d 173; Pet. App. 1a-5a).

1. The government's evidence showed that petitioner devised a scheme to hide losses in his retail outlets by inflating his inventory reports to the SEC, his creditors, and the bank that loaned him money. Petitioner solicited the assistance of Walter Spengler, the vice-president of the corporation, and Jose Umana, the corporate treasurer (Tr. 495, 510-511, 1568-1592). They in turn provided the forged documentation to conceal the true losses from the auditors (Tr. 1631-1640). One of Umana's assistants, however, revealed the scheme to the SEC (Tr. 1151-1152, 1218-1222, 1696-1699). After petitioner became aware the SEC had ordered a hearing into the matter, he promised Spengler and Umana large rewards if they would lie at the hearing (Tr. 1702-1704, 1721-1729). Umana refused, and subsequently he and Spengler testified against petitioner at trial. Although the company went bankrupt, the government's evidence showed that petitioner and his partners received approximately $2 million from the company (Tr. 120, 554-556, 1762-1766, 2187-2188; Govt. Exhs. 10, 11, 13).

Petitioner took the stand and denied any involvement in the day-to-day operations of the corporation or participation in the coverup. These contentions were flatly contradicted by documentary evidence in petitioner's own handwriting, which showed that he almost completely controlled every detail of the stores' operations (Govt. Exhs. 65, 113-116, 123, 135, 155-158, 166). His denial of attendance at a restaurant meeting to plan the coverup was contradicted by his own charge account records (Tr. 2162; Govt. Exhs. 38, 146). Similarly, corporate records directly contradicted a number of petitioner's assertions

that he had only engaged in proper activities (Tr. 2575-2576, 2592-2593, 2595-2596; Govt. Exhs. 43, 54, 88, 90, 126, 132, 154, 175).

2. Petitioner contends (Pet. 10-11) that the prosecutor's summation, which occasionally characterized his testimony as "lies", requires reversal of his conviction. This contention lacks merit in the circumstances of this case.

It is undisputed, as stated in *Berger* v. *United States*, 295 U.S. 78, 88 (1935), that it is just as much the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." One of the legitimate means that is "universally accepted," however, is the recitation by the prosecutor of contradictions in testimony, coupled with the "perfectly proper" comment that if the jury believes one witness, it must disbelieve the other. *Harris* v. *United States*, 402 F. 2d 656, 658 n.3 (D.C. Cir. 1968) (Burger, J.). On the other hand, "where the terms 'fabricated' or 'lies' are used repeatedly to the point of excessiveness, the line between the 'undignified and intemperate' and the hard or harsh but fair may be crossed * * *." *United States* v. *Craig*, 573 F. 2d 455, 494 (7th Cir. 1977), cert. denied, No. 77-1502 (October 2, 1978) (citations omitted).

Here, the use of the word "lies" was always preceded by a carefully constructed explanation showing there was a contradiction between a statement by petitioner and other evidence.[1] While the prosecutor should not have stated

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[1]At several points in his summation the prosecutor summarized the documentary evidence that contradicted petitioner's testimony. The

that this inconsistency showed petitioner was lying, since any such determination was for the jury to make, it is obvious that petitioner was not prejudiced by these comments. Not only did both Umana and Spengler's testimony contradict petitioner's statements that he was totally uninvolved in the scheme to defraud, but documentary evidence supported their testimony at every step. Moreover, the court instructed the jury that it alone was empowered to determine the credibility of the witness from the evidence (Tr. 2694-2697). Under these circumstances, the court of appeals was amply justified in concluding (577 F. 2d at 175):

> * * *[T]he summation, which alone took the better part of an afternoon, came at the end of a long and difficult trial, lasting almost four weeks. The jury was to be swayed either by Sprayregen or by the two primary witnesses for the government, and it is unlikely that a few intemperate remarks made in the course of a month-long trial affected its result.

Accord, *United States* v. *Micklus*, 581 F. 2d 612 (7th Cir. 1978); *United States* v. *Carleo*, 576 F. 2d 846 (10th Cir. 1978), cert. denied, No. 77-6851 (October 2, 1978); *United States* v. *Restrepo-Granda*, 575 F. 2d 524 (5th Cir. 1978); *United States* v. *Craig*, *supra*; *United States* v. *Tanda*, 568 F. 2d 1122 (5th Cir. 1978).[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

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bulk of the summation objected to occurred in the following paragraph (Tr. 2596):

> Ladies and gentlemen, that man would tell you the sky was green if it would permit him to escape conviction here. That is the most bald faced misrepresentation of a record of facts I can imagine. He will sit there and tell you that your skin is blue if he thinks it will get him off.

[2]The cases upon which petitioner relies, *United States* v. *White*, 486 F. 2d 204 (2d Cir. 1973), cert. denied, 415 U.S. 980 (1974), and *United States* v. *Bivona*, 487 F. 2d 443 (2d Cir. 1973), are not to the contrary. As the court of appeals here noted, the prosecutor's comments in those two cases were highlighted by the brevity of both the trial and the summation (Pet. App. 4a). In any event, any minor differences in emphasis that may exist between *Bivona* and this case amount to nothing more than an intracircuit variance, which is not an appropriate occasion for invoking this Court's jurisdiction. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).